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The Past, Present, and Future of Title VI of the Civil Rights Act as a Tool of Environmental Justice

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PANEL DISCUSSION

THE PAST, PRESENT AND FUTURE OF TITLE VI OF THE CIVIL RIGHTS ACT AS A TOOL OF ENVIRONMENTAL JUSTICE

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MR. MICHAEL GERRARD: I am going to try to do something a little unconventional. After hearing some remarks from Professor Johnson, I will try to start a dialogue. I have been requested to ask very tough questions of our panelists, so I will do that in the hope of drawing all of you in the audience into the dialogue. First, we will hear some remarks from Professor Nicholas Johnson of Fordham University School of Law.

PROFESSOR NICHOLAS JOHNSON: I am going to try to focus some of the ideas that people have already advanced. The first point is on the Title VI⁷ question: first a comment and then a question for the panelists. The comment is that it seems to me when discussing Title VI claims, we really have to draw a significant boundary line between those claims that are based on discrimination in the enforcement of environmental laws, versus those claims that are based on discrimination in the siting decision-making process. The question that I raise is for purposes of evaluating disparate impact in an initial siting. Specifically, what is the base line against which to measure disparate impact? The an-

dominantly African-American and Latino communities in New York City.

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7. Title VI of the Civil Rights Act, 42 U.S.C. §§ 1981-2000h-6 (1979).

swer I have reached is that we are measuring disparate impact against similarly situated communities. It strikes me that this is a factual burden for environmental justice advocates that may well be insurmountable.

Courts should take up the issue of disparate impact more vigorously and start to ask what it means for a community to be disparately impacted. To embellish the idea further, consider that the community is not just the people, it is also the land. To the degree that we still hold land to be unique, such factors as hydrology, topography, and weather all make a difference. Even in similarly situated communities it still may be very difficult to find the base line which would show the disparate impact.

The next point I wish to discuss is what we mean by environmental justice and specifically, distributional justice. The question I will pose is whether distributional justice is environmentally sound. Even assuming we are really serious about distributional justice, how could we achieve it? One way is to divide the country into five-mile square quadrants. We could then weigh the locally undesirable land uses, or "LULUs" within those quadrants, and figure out some way to ensure that there is absolute equality in each quadrant. Obviously, we would not want a bunch of LULUs in Yosemite National Park, or other places that we treasure. For that matter, New York's Central Park would probably not be on our list either. This approach would create a whole new set of environmental justice problems.

I would like to propose a second, less absurd version of a method by which we might implement a scheme of distributional justice. First let us assume that the view of many rural residents, as opposed to urban residents who admittedly are disproportionately represented on this Panel, is that a principal tenet of distributional justice requires communities to deal with their waste problems within their own boundaries. We have seen

this arising in the context of southern and rural states, urging that there is improper dumping by New York City and other northeastern cities in their states. If we take this idea seriously then distributional justice means that New York City, Philadelphia, Boston, and other major cities, which generate a lot of waste within their borders, ought to figure out a way to dispose of the waste without going outside the border. This highlights the problem that may be physically impossible for these cities to overcome. New York City generates a lot of trash, and the only disposal options are to truck it out of the City or to incinerate it, both of which are politically and environmentally unsatisfactory. So, this second approach to distributional justice, for cities to solve their own problems, also fails for political and logistical reasons.

The next question then is whether there is a future for a serious implementation of the idea of distributional justice. Do we simply fight on the margins and talk about environmental justice, or is there a possibility that we can develop a legislative program to accommodate the interests of communities that have been overburdened? Suppose we legislate a maximum number of LULUs that a particular community, however defined, should be required to endure. Though this may still be a zero sum gain, it is a mechanism through which the undue burden suffered by minority communities would be eased.

The question I will leave on the table is whether anyone knows how we could develop the notion of distributional justice into something that generates significant legislative responses, and social changes, as opposed to the current use of environmental justice as a litigation tool.

MR. GERRARD: I will begin by saying a couple of words about your very interesting proposals for achieving distributional justice. I took a look at some related

issues a few years ago, and one of the problems is that what is an undesirable land use to one person, is a desirable use to another. For example, while some communities may regard a homeless shelter with horror, others may need and welcome one.

PROF. JOHNSON: This brings to mind the Home Depot example.⁸

MS. PEGGY SHEPARD: The people I work with do not want a Home Depot in their neighborhood for very good reasons. I think it is a mistake to frame environmental justice issues in terms of distributional concerns. We have to go beyond the distributional paradigm. What I think is important is that there is a lack of a fair, meaningful decision-making process. What should environmental justice be? It should be some notion that the community should have a say in the environmental burdens and/or benefits that come in and will affect that community. It is not a pure procedural notion of justice. I am not saying that if the process is sort of "fair" we should adopt it; rather, it has to be a process with distributional outcomes in mind.

Let me use the Home Depot example again. It is a good idea to have Home Depots in the world, but we should take into account very seriously what else the community wants. The community knows their environment and knows what is best for them. Maybe they need some technical experts to help them identify what else should be in the community, but the decision-making process should involve them quite substantially.

8. There has been a trend in New York City to build big box malls and mega-stores, such as K-Mart and Costco. Recently, a proposal that included building a Home Depot in East Harlem passed the zoning review process. See *Shopping Center in Harlem Approved*, N.Y. TIMES, Oct. 28, 1999, at B11.

Therefore, the answer to the question of whether a community should bear a Home Depot, is a matter of assessing what a community already has and does not have.

MR. GERRARD: When the musical chairs end, there will be many of facilities with no homes, because there are many kinds of facilities that nobody wants, yet there seems to be a regional or national need for them. How do you balance the need for a community's self-determination with the need for some of these indisputably undesirable facilities?

MS. MELVA HAYDEN: Let me try to address that question with an example that we saw recently in the South Bronx. I think I am going to use the term paternalism, meaning that communities left to their own self-determination will not make the proper decisions about what they will allow into their communities, and what kinds of land uses they want to keep out.

In the South Bronx we went on a tour of waste facilities. We looked at the Hunts Point area and another area where they are developing the rail, as well as trying to revitalize the area. It is one of the largest food processing areas remaining in New York City. Although the community is not opposed to having more food processing businesses, the influx, infiltration, and proliferation of these recent waste or trash transfer stations locating in the South Bronx are of paramount concern to the community's residents. As you may know, Mayor Giuliani's decision to close the Fresh Kills Landfill by 2001⁹ has made it necessary for the City of New York to find alternative ways of management and disposal of the

9. See, e.g., Douglas Martin and Andrew C. Revkin, *The Last Landfill: A Special Report*, N.Y. TIMES, Aug. 30, 1999 at A1, available in LEXIS, News File (discussing New York City's plan to close the Fresh Kills landfill by 2001).

City's solid waste. As a result, alternative waste or trash transfer stations have begun to proliferate in certain communities. Whether this is due to supply and demand or benign neglect to meaningfully include the community in land use decision-making, there is no disputing they are there.

My point is that this community in the South Bronx has decided that they do not oppose the food processing businesses. The community's perception is that when waste or trash transfer stations come in they do not have to be rigorously regulated and permitted.¹⁰ As the community sees it, instead they just crop up and begin operating.

I think it would be a misnomer to assume that community residents have meaningful involvement in decision-making, they will not make proper land use decisions. As far as distributional justice, the "Not in My Backyard" or "NIMBY" debate has been going on since the dawn of creation, since folks realized that they had political clout to keep out certain kinds of land uses, while allowing others.

MR. GERRARD: I am not sure if you have answered the question of balancing the communities' need for self-determination with the need for certain industrial facilities. The problem created by Fresh Kills,¹¹ erects a wonderful laboratory of environmental justice conflict, which we are seeing play out right now. We will for the next several years see the burden of solid waste disposal which was once concentrated in one place, the west end

10. See, e.g., Vincent P. Esposito Jr., *SEQR Update*, NEW YORK ENVIRONMENTAL COMPLIANCE UPDATE, February 1995, Vol. 1 No. 6 (stating a permit for a solid waste transfer station was issued despite studies indicating the station would have adverse environmental impacts in the area).

11. See Martin and Revkin, *supra* note 9.

of Staten Island, now distributed throughout the City of New York. Is there any other alternative to cramming these facilities down the throats of unwanting communities? What is the alternative?

MS. SHEPARD: Yes, there are alternatives. First, the thing that I find interesting about the distributional paradigm is that if New York City actually had to deal with its own waste, we would probably get a municipal government that would only be purchasing recycled content. We would also get a government that makes the schools recycle and that is serious about recycling. We would have entrepreneurs using those recycled materials for better use, and we would get very serious about dealing with our trash. I suspect we would then end up with incineration, which creates its own set of problems.

PROFESSOR SHEILA FOSTER: Why are you assuming that there would not be any volunteer communities? The nature of the siting process as I understand it is that developers do not inform the community of the benefits or the burdens. Instead they choose a community in which it would be easy to place a facility without encountering any opposition. So, in short, I agree that the local veto only produces the problem if you assume no one would want it, and I do not think that's a safe assumption.

MR. GERRARD: For the past eight years I have been representing pro bono the Natural Resources Defense Council in its lawsuit against New York City¹² for the City's failure to carry out its recycling law,¹³ so I will not

12. See *Natural Resources Defense Council v. New York City Dep't of Sanitation*, 83 N.Y.2d 215, 630 N.E.2d 653 (1994).

13. ADMIN. CODE OF THE CITY OF NY §§ 16-301 through 16-324 (1989).

disparage recycling in any way. However, even the most wild-eyed advocates of recycling and waste minimization say that the recycling law will reduce the municipal solid waste load by maybe 40 percent, which is probably unachievable. Even if it was possible, what would we do with the remaining 60 percent?

PROF. JOHNSON: I spent a couple of years in Pennsylvania doing very painful things in the vein of what you are discussing. I tried to convince people that during the operation of the Demonstration Medical Waste Tracking Act¹⁴ there was exportation of waste from Pennsylvania into other states, and that they needed a type of facility that I, and a group of developers, were suggesting might be appropriate. Our unique turn on this problem was that we were going to do exactly what you said, that is, we were going to be the environmental good guys. We were going to go in and talk to the communities first and sell this facility and everything that comes along with it.

Generally communities make determinations very early on that something is happening which they do not completely understand, and they become very weary about people coming in and telling them everything is going to be all right. I believe that most of these problems are scientifically and technically complicated, so the soft sell approach that you are suggesting is probably not viable.

PROF. FOSTER: I would not suggest a soft sell approach. In fact, I would not suggest a sell approach at all. I think you have to be more than honest and up front and spend money to give communities the technical assistance and answers they need to help them establish trust and real understanding of what they are getting. This may be an idealistic model, but if you look

14. 42 U.S.C. §§ 6992-6992k (1998).

at some of the instances of volunteer community sitings in Canada,¹⁵ they have been able to work things out with the community.

I think that the flip side of the NIMBY problem is the tragedy of the commons. This principle is that if you have a resource, and you fail to define who owns it, everybody will act as if they own the whole resource. If you have a problem, and you wait for somebody to volunteer to take this problem, it is the equivalent of watching a fly ball come down in between two of the outfielders; when each one is going to think the other has it, it is going to fall to the ground.

MR. GERRARD: What has happened almost invariably in the United States is that even if a locality volunteers to accept a waste facility, a state may refuse to allow them to take it. In New York City, it is almost impossible to find a community that would genuinely volunteer under the circumstances to take a solid waste transfer station or incinerator.

MS. HAYDEN: I want to go back to the paradigm about volunteer communities suggested by Professor Johnson. We could begin with the role of host communities, those that would accept the transfer of waste. Many cities and states see significant financial benefits to hosting certain kinds of land uses and industry such as solid waste disposal landfills. Until the recent difference of opinions between our Mayor and the state of Virginia, the state was well on its way to being such a host state

15. See, e.g., BARRY G. RABE, *BEYOND NIMBY: HAZARDOUS WASTE SITING IN CANADA AND THE UNITED STATES* (1994); MICHAEL B. GERRARD, *WHOSE BACKYARD, WHOSE RISK: FEAR AND FAIRNESS IN TOXIC AND NUCLEAR WASTE SITING* (1994).

for New York City's and perhaps other cities solid waste.¹⁶

We, at the EPA Region 2, have developed a Draft Interim Policy on identifying environmental justice areas and a methodology where we look at the community of concern (COC) which is the community that raises an informal environmental justice concern with the Region.¹⁷ We use "informal" to distinguish these types of complaints from "formal" Title VI administrative complaints. Next, we evaluate the site-specific facts of the environmental justice problem or complaint. Hypothetically speaking, the site-specific problem may involve a siting situation, but there may also be a complaint or concern about the community's high rate of asthma, poor air quality, sub-standard housing. Unfortunately, EPA does not have regulatory authority over all of the concerns in this hypothetical case, but our interim policy and geographic information systems (GIS) tools enable the Region to identify the COC and get some idea of the environmental and other problems confronting that community.

As a further example of our methodology, say a waste or trash transfer facility is being proposed in their community. First we would need to determine a reference area or community to be able to make a comparison as to whether the COC when compared to the reference area or community is being disproportionately and adversely affected by the proposed or actual facility. We then would develop community load profiles by overlaying other demographical and environmental data

16. See, e.g., Jeremy Redmon and Stephen Dinan, *New York's Guiliani Talks Trash to Virginia*, WASHINGTON TIMES, Jan. 15, 1999, at A1.

17. See generally United States Environmental Protection Agency, Draft Interim Policy on Identifying Environmental Justice Areas iii (June 1999) (visited Feb. 24, 2000) <<http://www.epa.gov/r02earth/community/ejpolicy/ejindex.html>>.

(e.g., % of minority population, % of households below poverty level, toxic release inventory, density of facilities, air quality standards, etc.) to compare whether the COC as compared to the reference community is significantly or disproportionately burdened by adverse environmental and health effects. We have developed thresholds or cut-off percentages for each of these demographical and environmental indicators. The Region's Interim Policy should be disseminated soon for public comment and we are still refining our GIS identification methodology and tools.

However, if a waste or trash transfer station is the focus of an informal environmental justice complaint or concern, we would need to find a reference community or area with similar infrastructure and facilities to avoid trying to compare apples and oranges. Since a methodology for measuring or quantifying "actual" environmental risk or burden has yet to be developed. The EPA's Office of Civil Rights is still endeavoring to develop methodologies for quantifying or measuring whether or how a permitting decision resulted in unintended "disparate treatment or impacts" under a Title VI administrative complaint analysis; and the Region is working towards refining our methodology for quantifying "relative" disproportionate and high adverse environmental and health effects on low-income and/or minority populations under an environmental justice type analysis.¹⁸ The Interim Title VI Guidance is attempting to answer the former. Future environmental justice guidance may seek to address the latter.

QUESTIONER: Someone raised the point earlier why they would not want these facilities in their community,

18. See generally United States Environmental Protection Agency, *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (1998).

and my question to you is how do you propose to go about selling it to those communities?

MS. SHEPARD: I am not in the business of pushing waste transfer stations. Instead of selling, I ask why you would not want it in your community? Some of the reasons include too much traffic, bad odors, no enforcement, and no monitoring. The problem is that New York City is too densely populated to really have something like a waste transfer station. The answer has to be that the waste cannot be focused and concentrated in one or two communities.

QUESTIONER: Could you please expand upon the idea that it is different to have this conversation about New York City compared to other parts of the country. If I understand correctly, it is not as though any neighborhood within New York City can just decide to take the transfer station. There are only a few areas that are zoned for transfer stations.

MS. ELIZABETH GEORGES: That raises the interesting point that a lot of these issues in terms of siting are not only about land use. They are about zoning permit laws and they are about concerns that federal permit programs, unfortunately, do not have the authority to touch.

PROF. FOSTER: But I would argue that federal permitting programs in the siting process operate on the backs of these other problems such as zoning problems, and the fact that zoning is inequitably mapped out. I do not think you can separate the laws and the decision-making process from the social structure.

MS. HAYDEN: How do you reach the local government level? For example, if federal monies that we give to state environmental regulatory agencies trickle down to

the local sanitation department and they license waste or trash transfer stations, then the financial nexus may be the hook or tool that you use to get them into the equation. From the affected community's perspective it may be the only legal tool available, because I am not certain that a permitting statute is the answer.

MS. GEORGES: Now you are giving us a definition of what is a covered "program or activity" under Title VI.¹⁹ I think the Supreme Court has been very specific with respect to permits. They have held that Title VI will reach the agency granting the permit, but not the end user. There are lines as to what is an appropriate program or activity. I wonder, given the manner in which so many states do not allow their environmental agencies to have control over land use decisions since the zoning is made by a separate agency, if it is possible to consider a local zoning board a "program or activity" under Title VI so that EPA could reach it through its federal funding.

MS. SHEPARD: I would like to return to the comment about zoning. As an example, moving Home Depot into East Harlem requires rezoning. It is not zoned for that big box store. There are some outlying areas of low-income neighborhoods that are zoned for manufacturing, which applies to other affluent areas of the City, as well. The zoning has just been changed. Again, we have to really look at zoning in the context of environmental justice to see which communities are best able to represent themselves, and have their neighborhoods zoned in a way that unwanted land uses do not occur.

QUESTIONER: Traditionally, the majority of the minority communities were mixed-use zoned communities.

19. "Program or activity" is defined under Title VI at 42 U.S.C. § 2000d (1964).

Basically it is a local land use problem. At the same time, there is often a lack of organizational resources in some communities that are affected by this status. So my question would be to Professor Foster and Ms. Shepard, who have touched on the subject. What suggestions do you have to localize resources to deal with some of the more historic problems?

MS. SHEPARD: Well, the way my organization deals with it is by educating and mobilizing residents. For instance, I have been part of the Hudson River Park Alliance, which helped create a multi-million dollar park below 59th Street. We have put together a steering committee of elected officials, business, industry, and community boards. We have organized the community in such a manner as to express their ideas and attract *pro bono* help, in an effort to assist the community's needs at the waterfront. It will be able to create the political will, and to create a different kind of plan that the City will be persuaded to consider.

MR. GERRARD: I would like to ask a question, which I will begin with an observation. When siting a brand new facility, it may not be possible because of the existence of wetlands, park land, historic sites, an endangered species habitat, steep slopes or whatever. When you eliminate all these other obstacles, there may be very little land left, if any.

Now, one of those areas that gets automatically eliminated is not what you might call an environmental justice community. There are endangered species protection acts, wetlands protection acts, and historic preservation protection acts, but no poor people protection acts. Would you advocate the enactment of a law that would automatically zone out these minority or low-income communities? If so, what would you do when there is absolutely no place to put facilities, because everything fits within some prohibited zone, and if one

must out rank another, which would trump what? Would you protect the wetlands before you would protect a low-income community? How would you set the priorities?

MS. SHEPARD: Again, we have to look at communities holistically. Frankly, there are not any environmental justice people I know of who want their community to be called an environmental justice community. It is industry that is red lining. For instance, if I say the word Harlem to many, the community has already been red lined. For many, the mere mention of Harlem strikes fear into some people's hearts. They are not going to go there. They are not going to locate a Gap store there, unless they obtain benefits and incentives, and then, they may consider going there. So I do not have to red-line these communities any more than they already are. We have to look at the cumulative impacts; we have to figure out the synergistic effects. We have to look at regulated and unregulated sources. We have many unregulated small business sources, such as small dry cleaners, that are contributing greatly to pollution in New York City. New York City is the only city in New York State that allows dry cleaners to locate in residential buildings. What I propose is to also look at a particular community's health indicators. If you have the highest infant mortality rate, if you have the least access to primary care physicians, do you really think that that is the kind of community that needs to take on the added risk of certain kinds of facilities? And, yes, I think that a community with very poor health status should probably not be the first community to take on further risks.

MS. HAYDEN: I believe it would be a question of businesses and communities entering into meaningful dialogue up front and early in the process with each other, in addition to permitting or regulatory agencies.

This may prove more fruitful than newer or more restrictive regulations. As an employee of the government, I fully understand that the question of where businesses could locate arises. Communities that are economically disadvantaged do not need the lure of jobs and failed promises. Rather, they need real jobs and economic development. I think businesses would buy into such an approach, as well, because they do not want to spend a lot of investment capital in communities that do not want their business. I think the community would also benefit from knowing that a company would be a good environmental neighbor.

PROF. FOSTER: It is a policy question. The siting criteria are technically and environmentally based, but many are policy choices that regulators have made. The question is would I draw bright lines? The answer is no. But I would not draw them for any of those other things either. I would not say absolutely no, do not put something in a community with a wetland. I would want that to be a strong consideration, just like I would with a community with these types of characteristics.

MR. GERRARD: So you would eliminate, for instance, the "thou shalt not" effect Section 4(f) of the Department of Transportation Act,²⁰ which says you can not traverse a park under any circumstances, with transportation?

PROF. FOSTER: That is my inclination, but I do not want to be put on record as saying yes, definitely. I would be willing to revisit and include some additional considerations that are not currently included.

MR. GERRARD: I had a case a few years ago in New Jersey where there was a state highway, and there were three ways that it could have led. It could have gone

20. 49 U.S.C. 303(c) (1994).

through a wetland, it could have gone through an area that was in a farmland protection zone, or it could have gone through a residential area. Ultimately, the road went through the houses, because there was no law saying that the highway could not go through the houses. There were laws that made it very, very difficult to go through the wetland or the farmland protection, so the houses lost.

Now, let me pose another question about the relationship between environmental justice concerns and environmental laws. If something is really bad, and it will harm public health, you should not do it. What is wrong with that argument?

MS. HAYDEN: The *Select Steel* case²¹ that was a PSD²² permit, was the first decision out of the box for EPA's Office of Civil Rights. Let us use that PSD paradigm. I absolutely agree that it is a health-based standard, in terms of exceeding the National Ambient Air Quality Standards.²³ While I am comfortable that this standard takes into account the most sensitive sub-population in terms of health-based effects, where an environmental justice or Title VI issue is raised. I am confident that the NAAQS standard takes into account the most sensitive sub-population in terms of health-based effects. Whether it is raised as an environmental justice issue or as the chief focus of a Title VI complaint, I would be comfortable in saying there is no adverse impact if air quality is the only complaint by the community of concern.

However, in most instances where environmental justice issues are raised and subsequently communities file

21. *In re Select Steel Corporation of America*, Docket No. PSD 98-21 (EAB Sept. 10, 1998).

22. PSD stands for the Prevention of Significant Deterioration. For details on the PSD permitting program see 40 C.F.R. § 51.166 (1998).

23. 42 U.S.C. § 7410 (1990).

administrative Title VI complaints, it is usually because the affected communities are experiencing a number of environmental problems that they believe may pose cumulative environmental and health effects. In such situations, I am not comfortable in each and every instance saying that if the air quality standard does not exceed the NAAQS, there is no adverse impact.

PROF. FOSTER: If the complaint is only air pollution, I think there is a strong argument that the complaint may be health based. But, that also assumes that we know all of the air pollutants in the community, which is often not the case. In a lot of these communities, people complain about health problems, but we really do not know the cause.

MR. GERRARD: These complaints affect everybody, not just those suffering from disparate impact. If the answer is the air pollution standards are not high enough, perhaps we should lower the National Ambient Air Quality Standards and require more cumulative impact statements. But you do not need environmental justice to do that. You can say that there is a deficiency in the administration of the Clean Air Act.²⁴

PROF. FOSTER: The remedy depends on how you think about environmental justice. I see environmental justice as expanding our notion of what we should care about environmentally, so it is not just concerned with a particular racial population. But I think having an environmental justice consciousness means expanding our notions of what we think of as impacting environments, and what environments are. I think we need to make sure that those standards are taking into account the types of problems that we have not traditionally been

24. 42 U.S.C. §§ 7401-7671q (1977).

concerned about and that the environmental justice movement has now brought to our attention.

MR. GERRARD: The solution comes down to partly a choice of regulatory tools. There is the regulatory tool of the Clean Air Act, which is aimed quite precisely at looking at these issues. Is that the regulatory system which is best equipped to ensure that people are not exposed to unhealthy levels of air pollution?

MS. SHEPARD: No, it is not. We should look at air quality and land use as well. For instance, we are considering filing a Title VI case with the Department of Transportation. Out of all of the bus depots in New York City, there are three in the Bronx, four in Brooklyn, three in Queens, and seven in Manhattan, with six above 100th Street. That's a really tiny area for six of them. So we have one community that is home to more than one-third of the bus fleet, and we know that diesel particulates are carcinogens. We know that they exacerbate asthma, and we know that this community has the highest rates of asthma in New York City. So I think that we have to look at land use issues. We have to look at why the Department of Transportation has exemptions from environmental processes, simply because they have always owned the land. The problem involves more than measuring air quality.

QUESTIONER: I am curious about your opinion on the location of facilities. For example, if you were to put a waste station on 79th street and Riverside Drive, people in that affluent area would have the option and the ability to move out, whereas others may not have such means. So would enforcement solve that, or is it possible that the facilities create the problem?

MR. GERRARD: One of the debates within the environmental justice community, more on the academic

side, is: which came first, the low-income minority community or the locally undesirable land use?

PROF. FOSTER: I have responded to this "chicken or egg" argument,²⁵ perhaps effectively, perhaps not. Certainly it is an empirical question, as opposed to what I would call a normative question. That is to say, understanding how a community got to be overburdened is important. But answering the empirical "chicken or egg" question does not answer the normative question of whether it is unjust. In some communities the facilities came before the people of color, and, in other communities, it is the opposite. Some people say, why does this matter? Let us deal with the problem rather than the cause. That is only one answer. The short answer to your question is that in some communities the people were there first, and other communities the facilities led. It does not answer the fundamental environmental justice question, which is to say, is it unjust for certain communities of color, and low income communities, to bear a disproportionate burden regardless of how they got that way?

QUESTIONER: Do you believe better enforcement laws might solve that issue?

MS. HAYDEN: Probably not, because zoning is a local prerogative.

PROF. FOSTER: The truth is, no one is going to want to live next to a landfill. That is why the most powerful

25. See Vicki Been, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 *ECOLOGY L.Q.* 1 (1997); see also Sheila Foster, *Justice From the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 *CAL. LAW REV.* 775, 793-98 (1998).

communities have been able to resist them, which in this society, corresponds with socio-economic class and race.

MS. HAYDEN: I think it is the negative consequence that comes about when the affected are not meaningfully involved in the land use decision-making process.

MR. GERRARD: We are out of time, but I want to thank all of the panelists for a very stimulating discussion.